2018 IL App (2d) 160226-U
No. 2-16-0226
Order filed June 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NIKOLAS SENTORO DUNN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-CF-3135 Honorable John R. Truitt, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel's Rule 604(d) certificate was not refuted by the record: counsel consulted with defendant, and defendant's subsequently sending him a letter asking him to raise additional issues did not trigger a duty to consult with him further and make (further) amendments to the motion.

¶ 2 Defendant, Nikolas Sentoro Dunn, pleaded guilty in the circuit court of Winnebago County to a single count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2010)). Other charges against defendant were dismissed in exchange for his plea, but there was no agreement as to sentencing. Defendant was sentenced to a 24-year prison term, the trial court denied his motion to reconsider sentence, and he filed a notice of appeal. Defendant contends that, because the trial

court never ruled on his motion to withdraw his guilty plea, we lack jurisdiction. Defendant also argues that a remand is necessary because the record refutes postplea counsel's certificate that he complied with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). We affirm.

¶ 3 Defendant entered his plea on February 19, 2015, and the trial court imposed sentence on April 23, 2015. Through his attorney, assistant public defender William Weatherly, defendant filed a motion to reconsider his sentence on May 19, 2015. That motion ostensibly sought relief pursuant to section 5-8-1 of the Unified Code of Corrections. 730 ILCS 5/5-8-1 (West 2014).[1] On the same date, Weatherly filed a separate motion, pursuant to Rule 604(d), to withdraw defendant's plea or alternatively to reconsider his sentence. Two days later, defendant filed a *pro se* motion for reduction of sentence in which he alleged, *inter alia*, that he did not receive the effective assistance of counsel. On July 22, 2015, Weatherly filed an amended motion for reconsideration of defendant's sentence. The motion alleged that Weatherly failed to provide defendant with effective assistance of counsel. Thereafter, defendant was represented by assistant public defender Edward Light.

¶ 4 On February 5, 2016, Light filed a motion to reconsider defendant's sentence. On March 11, 2016, Light filed a certificate of compliance with Rule 604(d) dated March 11, 2016. On the same date, the trial court heard the motion to reconsider. At the hearing, Light advised the court that he had spoken with defendant several weeks earlier. Light stated that he had since received a letter from defendant. The letter indicated that defendant wanted to raise certain issues in

[1] Section 5-8-1 does not provide for reconsideration of a defendant's sentence. Presumably, Weatherly intended to seek relief pursuant to section 5-4.5-50(d) of the Unified Code of Corrections (*id.* § 5-4.5-50(d) (West 2014)), which provides, in pertinent part, that "[a] motion to reduce a sentence may be made *** within 30 days after the sentence is imposed."

addition to those raised in the motion to reconsider. Light requested a continuance, but the trial court denied the request. After hearing arguments on its merits, the trial court denied the motion.

¶ 5 Defendant filed a notice of appeal on March 21, 2016. Defendant subsequently filed a motion in this court to dismiss the appeal and to remand the case to the trial court with directions to proceed on defendant's motion to withdraw his plea. Defendant argued that, in the absence of a trial-court ruling on that motion, this court lacked jurisdiction. The State responded that defendant had abandoned the motion to withdraw his plea. This court denied defendant's motion to dismiss this appeal.

¶ 6 As he did in his motion in this court, defendant argues on appeal that, because the trial court did not rule on his motion to withdraw his plea, we lack jurisdiction. The State initially argues that the doctrine of *res judicata* bars us from considering our jurisdiction. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). The State argues that "[i]n this case, there has been a final adjudication in the court below and on the merits of the present claim in this Court." The argument is meritless. With respect to the proceedings in the court below, this appeal is not a "subsequent action." "[A]n appeal is not a new proceeding, but rather is a continuation of the proceedings in the court from which the appeal is taken." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 148 (1997). Nor does our denial of defendant's motion to dismiss this appeal bar us from revisiting the question of jurisdiction. Rather, "a motion panel's denial of a motion to dismiss an appeal prior to briefing is not final and must be modified by the panel hearing the appeal where jurisdiction is lacking." *In re Marriage of Teymour & Mostafa*, 2017 IL App (1st) 161091, ¶ 10.

¶ 7 We thus turn to the merits of the jurisdictional issue defendant raises. As pertinent to this issue, Rule 604(d) provides that "[n]o appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. July 1, 2017). Perfection of appeals in criminal cases is governed by Illinois Supreme Court Rule 606 (eff. July 1, 2017). Rule 606(b) provides, in pertinent part, that "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court." Ill. S. Ct. R. 606(b) (eff. July 1, 2017). Defendant argues that he did not abandon his motion to withdraw his guilty plea and that, because the trial court did not rule on the motion, the notice of appeal had no effect.

¶ 8 In support of his argument that he did not abandon his motion, defendant relies on our decision in *People v. Willoughby*, 362 Ill. App. 3d 480 (2005). In *Willoughby*, the defendant argued that the trial court erred in denying his motion to suppress evidence. The defendant raised the issue in a posttrial motion, but filed a notice of appeal without first obtaining a ruling on that motion. The State argued that, by doing so, defendant abandoned the posttrial motion, thereby waiving any error in the denial of the motion to suppress. We disagreed, reasoning as follows:

> "Under Rule 606(b), the filing of a notice of appeal does not abandon a timely posttrial motion directed against the judgment. Further, as abandonment requires 'a more affirmative indication *** than the mere filing of a notice of appeal' [citation], the failure

to procure a hearing on the motion, which is not an affirmative indication at all, does not suffice either." *Id.* at 483-84.

¶ 9 Defendant argues that there was no affirmative indication that he abandoned his motion to withdraw his plea. The State argues, *inter alia*, that defendant abandoned the motion to withdraw by subsequently filing amended Rule 604(d) motions that sought only sentencing relief. In his reply brief, defendant asserts that "the State does not explain how filing motions to reconsider the sentence affirmatively abandons a previously filed motion to vacate the plea." To see the flaw in this argument, one must first remember that defendant never filed any *separate* motion to withdraw his plea; rather defendant initially filed a single Rule 604(d) motion that asked both to withdraw his plea and for reconsideration of his sentence. Defendant then filed an amended Rule 604(d) motion seeking only reconsideration of his sentence. Amending his motion so as to remove the request to withdraw his plea was an affirmative indication that defendant had abandoned that request.[2] Through Light, defendant then filed a Rule 604(d) motion that, again, requested only reconsideration of his sentence. Filing this motion was yet another indication that defendant had abandoned his request to withdraw his plea. Accordingly, defendant's motion to reconsider was the only postplea motion before the trial court. Pursuant to Rule 606(b), defendant's notice of appeal, which was filed 10 days after the trial court disposed of that motion, was effective to vest this court with jurisdiction.

¶ 10 We next consider defendant's argument that a remand is necessary because the record impeaches Light's certificate of compliance with Rule 604(d). As pertinent to this argument, Rule 604(d) provides:

[2] Indeed, in his *pro se* motion for reduction of sentence, defendant had specifically confirmed that he did not wish to withdraw his plea.

> "The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." Ill. S. Ct. R. 604(d) (eff. July 1, 2017).

When defense counsel fails to comply with Rule 604(d)'s certificate requirement, the case must be remanded for proceedings in compliance with the rule. *People v. Janes*, 158 Ill. 2d 27, 35-36 (1994). The same is true when counsel files a proper certificate but it is impeached by the record. *People v. Love*, 385 Ill. App. 3d 736, 739 (2008).

¶ 11 At the hearing on defendant's motion for reconsideration of the sentence, Light advised the trial court that, after speaking with defendant several weeks earlier, he received a letter from defendant identifying additional issues that defendant wanted to raise. Light prepared and filed his Rule 604(d) certificate on the day of the hearing, but unsuccessfully sought to continue the hearing. According to defendant, this signifies that further amendments to the motion were (or might have been) necessary. If so, Light's certification that he made the requisite amendments to the motion would be false.

¶ 12 Defendant's argument is unpersuasive. Defendant does not deny that Light consulted with him. The thrust of defendant's argument, as we understand it, is that, when defendant later corresponded with Light by mail, Rule 604(d) might have required Light to amend the motion so as to raise additional issues identified in the correspondence. Defendant relies on *Love* in support of his argument, but that case is readily distinguishable. In *Love*, the defendant's

attorney filed a Rule 604(d) certificate, but later remarked that she thought that she needed to review the transcript of the guilty-plea hearing before proceeding with the defendant's postplea motion. Although counsel's remark could have meant that counsel had reviewed the transcript, but wished to further review it, this court concluded that the record left "the distinct impression that defense counsel had not, in fact, examined the transcript." *Love*, 385 Ill. App. 3d at 737. Unlike in *Love*, the record here does not impeach Light's certification that he had fulfilled his duties under Rule 604(d). Moreover, the trial court gave defendant the opportunity to raise additional issues at the hearing on the Rule 604(d) motion. Defendant did not identify any issues that were not already broadly encompassed by the motion that Light filed. Under the circumstances, we decline to hold that defendant's desire to raise new issues placed any further duties on Light under Rule 604(d).[3] Accordingly the record does not demonstrate any need to amend that motion.

¶ 13 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 14 Affirmed.

[3] We note that defendant does not argue that, in any event, the trial court abused its discretion in denying Light a continuance to further consult with him.